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Supreme Court, U.S.
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No. (1)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THE STATE OF TEXAS,
Petitioner,
v.
BRENDA FAY PARRISH,
Respondent.

Petition For Writ Of Certiorari To The Texas Court Of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I.

DOES THE FIFTH AMENDMENT, AS CONSTRUED BY THE HOLDING OF THIS HONORABLE COURT IN *GRADY V. CORBIN*, BAR THE SUCCESSIVE PROSECUTION OF CRIMINAL OFFENSES WHICH SHARE SOME "OVERLAPPING" CONDUCT BY VIRTUE OF THE FACT THAT THEY WERE COMMITTED IN THE SAME CRIMINAL TRANSACTION, NAMELY, MAY A DEFENDANT BE PROSECUTED FOR "DRIVING WHILE INTOXICATED" WHEN SAID DEFENDANT HAS PREVIOUSLY BEEN CONVICTED OF "SPEEDING," A CRIME WHICH IS NOT AN ESSENTIAL ELEMENT OF "DRIVING WHILE INTOXICATED".

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No. _____

IN THE

Supreme Court of the United States

October Term, 1992

THE STATE OF TEXAS,
Petitioner,

v.

BRENDA FAY PARRISH,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a writ of certiorari issue to the Texas Court of Criminal Appeals to permit this Honorable Court to review the decision in this cause which ordered the complaint and criminal information charging Respondent with "driving while intoxicated" to be dismissed.[1]

[1] The State of Texas, as Petitioner, and Brenda Fay Parrish, as Respondent, are the only parties to this cause.

DECISION BELOW

The decision of the Texas Court of Criminal Appeals is currently scheduled for publication. A copy of the Court's opinion is reproduced in Appendix A. A copy of the underlying opinion of the Court of Appeals for the Fourteenth District of Texas is reproduced in Appendix B. Rehearing was summarily denied by the Court of Criminal Appeals, and the order is reproduced in Appendix C. Petitioner's motion to stay the mandate of reversal has been granted, and the order is reproduced in Appendix D.

JURISDICTION OF THE COURT

Under 28 U.S.C. § 1257, this Honorable Court has juridiction to review "final judgments or decrees rendered by the highest Court of a State in which a decision could be had...by writ of certiorari...where any title, right, privilege or immunity is specially set up or claimed under the constitution, treaties or statutes of...the United States."

In this cause, Respondent was charged by information with the misdemeanor offense of "driving while intoxicated." Prior to trial, Respondent filed an application for writ of habeas corpus and special plea in bar on the theory that prosecution was barred by U.S. CONST. amends. V & XIV and TEX. CONST. art. I, § 14.[2] After a hearing, the trial court denied the writ on October 25, 1990, and Respondent

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[2] The appellate courts of Texas have uniformly held that the "double jeopardy" provisions of the federal and state constitutions are conceptually identical. *Compare Phillips v. State*, 787 S.W.2d 391, 393 n.2 (Tex. Crim. App. 1990); *Powell v. State*, 17 Tex. Crim. 345 (1884); *Wiggins v. State*, 816 S.W.2d 472, 473 (Tex. App.—Houston [14th Dist.] 1991, pet. ref'd); *State v. Marshall*, 814 S.W.2d 789, 792 (Tex. App.—Dallas 1991, pet. ref'd); *Heyduck v. State*, 814 S.W.2d 156, 157 (Tex. App.—Houston [1st Dist.] 1991, no pet.).

appealed from the court's order. The Court of Appeals for the Fourteenth District of Texas relied solely upon its interpretation of this Court's decision in *Grady v. Corbin*, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990). The Court of Appeals affirmed the trial court's order, but for reasons which Petitioner believed were inconsistent with this Court's decision in *Grady v. Corbin, supra*. Respondent and Petitioner both filed petitions for discretionary review with the Texas Court of Criminal Appeals. On June 19, 1991, the Court of Criminal Appeals denied Petitioner's request for review, but granted Respondent's petition for discretionary review.

On February 10, 1993, the Court of Criminal Appeals issued an opinion in which it ordered that the judgment of the Court of Appeals be reversed and the cause be remanded to the trial court with instructions that the complaint and information charging Respondent with driving while intoxicated should be dismissed. Petitioner filed a motion for rehearing pursuant to TEX. R. APP. P. 230, but the Court of Criminal Appeals denied the motion without a written opinion on March 17, 1993. Accordingly, the decision of the Court of Criminal Appeals became "final" for the purposes of this Court's jurisdiction on March 17, 1993. Moreover, there is no higher court in Texas in which a decision may be had.

The decision of the Court of Criminal Appeals rested solely upon its interpretation of the Fifth Amendment to the United States Constitution as guided by its understanding of this Court's decision in *Grady v. Corbin, supra*, and the Court did not rely upon the statutes or constitution of the State of Texas in reaching its decision.

CONSTITUTIONAL PROVISION AT ISSUE

The constitutional provision which is central to this cause is a portion of U.S. CONST. amend. V, which states:

> No person...shall...be subject for the same offence to be twice put in jeopardy of life or limb....

STATEMENT OF THE CASE

Respondent was involved in a traffic accident and arrested for driving while intoxicated. She was, at the same time, given a citation for speeding. Respondent entered a plea of "nolo contendere" to the charge of speeding and paid a fine. Thereafter, prior to trial on the charge of driving while intoxicated, Respondent filed a petition for writ of habeas corpus and a plea in bar in which she argued that she could not be prosecuted for driving while intoxicated since the prosecution would necessarily rely upon proof of conduct for which she had already been convicted, namely, speeding. The trial court denied Respondent's petition, and she filed an interlocutory appeal. Although the intermediate appellate court affirmed the trial court's decision, the Texas Court of Criminal Appeals reversed the judgment of the Court of Appeals and ordered that the misdemeanor complaint and information be dismissed.

REASONS FOR GRANTING THE WRIT

THE TEXAS COURT OF CRIMINAL APPEALS HAS ERRONEOUSLY DECIDED A FEDERAL QUESTION IN CONFLICT WITH THE DECISIONS OF SEVERAL

UNITED STATES COURTS OF APPEALS,[3] NAMELY, IT HAS ADOPTED THE "SAME CONDUCT" OR "SAME EVIDENCE" TEST TO ASCERTAIN WHETHER TWO ACTS OF CRIMINAL MISCONDUCT ARE THE "SAME OFFENSE" UNDER THE FIFTH AMENDMENT.

THE TEXAS COURT OF CRIMINAL APPEALS HAS ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, CLARIFIED BY THIS HONORABLE COURT, NAMELY, DOES THIS COURT'S DECISION IN *GRADY V. CORBIN* PROHIBIT SUCCESSIVE PROSECUTIONS OF CRIMINAL OFFENSES WHICH SHARE *INESSENTIAL* CONDUCT AS IN THE CASE OF "SPEEDING" AND "DRIVING WHILE INTOXICATED" WHERE THE TWO OFFENSES ARISE OUT OF THE SAME CRIMINAL TRANSACTION.

The Fifth Amendment protects against multiple prosecutions for the "same offense." When a defendant's conduct violates several statutory provisions, the question is often raised: Do these statutory violations constitute the "same offense" under the Fifth Amendment? Of course, the answer to this inquiry must always be an absolute "yes" or "no," and can never be a qualified "maybe." When the State puts a defendant twice to trial, logic dictates that there are but two possibilities; either the State is prosecuting him

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[3] *See United States v. Tormos-Vega*, 959 F.2d 1103 (1st Cir.), *cert. denied*, 113 S.Ct. 191 (1992); *Prince v. Lockhart*, 971 F.2d 118 (8th Cir. 1992).

for the "same offense" or is trying him for "different offenses." These concepts are mutually exclusive and, therefore, cannot both be true. This notion was made clear in *Grady v. Corbin, supra*, and the Court of Criminal Appeals demonstrates its misunderstanding of the holding by suggesting in this case that the answer to whether two statutory violations constitute the "same offense" depends in some fashion upon the prosecutor's strategy and trial tactics. It is Petitioner's position, that if two offenses are "different" at the commencement of trial, there is nothing the State or prosecutor may do thereafter to transform them into the "same" offense.

Moreover, the Texas Court of Criminal Appeals has misinterpreted this Court's decision in *Grady v. Corbin, supra*, to constitute a radical departure from its previous decisions concerning the scope of "double jeopardy" protections provided by the Fifth Amendment. It seems clear to Petitioner that this Honorable Court intended no such construction.

There are three distinct protections flowing from the Fifth Amendment:

> It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969). The test employed by this Honorable Court for determining whether two offenses are sufficiently distinguishable to permit the imposition of cumulative punishments was first formulated half a century ago in *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932):

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not ....

This test, in its purest form, constitutes a "bright line" rule which is easily applied to any two offenses to ascertain whether they constitute "one offense." The analysis rejects any suggestion that "jeopardy" is measured by the "same evidence" or "same transaction" test. Therefore, under the strict "*Blockburger*" test, conspiracy to commit an offense and the completed substantive offense are separate crimes which may be punished by the imposition of separate sentences. *Compare Iannelli v. United States*, 420 U.S. 770, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975).

However, since "separate offenses" must, under the "*Blockburger*" test, *each* possess an element not shared by the other, a defendant cannot be separately prosecuted for a crime and some lesser included offense of that same crime. *Brown v. Ohio*, 431 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977).[4] Moreover, this Court has held that the sequence of the prosecution is unimportant; the rule remains the same regardless of whether the State commences its

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[4] Interestingly, this Honorable Court has also held that while a lesser included offense should be considered as one offense with the greater crime, this fact alone does not preclude the prosecution of both offenses in a single trial with the imposition of concurrent sentences. Where the defendant prevents the joint prosecution of both offenses in a single trial, he may be separately prosecuted for the offense and the lesser included offense so long as the defendant is not subjected to cumulative punishments. *Compare Jeffers v. United States*, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977).

prosecution with the greater or lesser offense. Once the State commences prosecution of a criminal offense, all offenses which, by their constituent elements, are lesser included offenses of that crime *or* are "greater" offenses by virtue of the fact that they contain all the elements found in that offense are barred by the Double Jeopardy Clause.

The "bright line" rule announced in ***Blockburger***, was expanded slightly as this Honorable Court considered the possibility that some "lesser included offenses" may, on occasion, actually contain elements that are quite different and distinct from the "greater" offense. For example, in *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977), the defendant was first convicted of "felony-murder." In a subsequent prosecution, he was convicted of robbery arising out of the same transaction. Although there are a number of statutory elements for the offense of felony-murder which are not shared by the offense of robbery, and elements of robbery not shared by felony-murder, this Court noted that where the robbery has been previously alleged and utilized by the State to satisfy the intent required to achieve a felony-murder conviction, the robbery is, of necessity, a lesser included offense of the felony-murder and, therefore, barred by the double jeopardy clause of the Fifth Amendment.

In its simplest form, the common law offense of felony-murder may be perpetrated any time a homicide occurs during the commission of a felony offense. The underlying felony need not be robbery as was the case in *Harris v. Oklahoma, supra*, but could just as easily be burglary, kidnapping, or arson. However, whatever felony is used by the State to elevate the homicide to "felony-murder" is, of necessity, a lesser included offense even though it does not fit neatly within the ***Blockburger*** test. Fortunately, there are only a handful of criminal offenses

which, by their nature, are dependent upon the commission of some other crime before they are complete. In addition to felony-murder, involuntary manslaughter is another offense which, on occasion, often incorporates proof of the commission of other crimes to satisfy its *mens rea* element of "recklessness." For example, the State often alleges in an involuntary manslaughter indictment that the defendant committed one or more minor traffic offenses to show that the defendant/driver was "reckless." Therefore in *Illinois v. Vitale*, 447 U.S. 410, 419-20, 100 S.Ct. 2260, 2267, 65 L.Ed.2d 228 (1980), this Court held:

> If, as a matter of Illinois law, a careless failure to slow is always a necessary element of manslaughter by automobile, then the two offenses are the "same" under *Blockburger* and Vitale's trial on the latter charge would constitute double jeopardy under *Brown v. Ohio*. In any event, it may be that to sustain its manslaughter case the State may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure; it may concede as much prior to trial. In that case, because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial under *Brown* and our later decision in *Harris v. Oklahoma*....

While the aforementioned statement was merely dictum in *Illinois v. Vitale*, it became the essential holding a decade later in *Grady v. Corbin, supra.*

Citing its previous holdings in *Blockburger v. United States, supra*, and *Illinois v. Vitale, supra*, this Honorable Court confirmed in *Grady v. Corbin, supra*, the notion that

if an essential *element* [5] of an offense can only be established by proof of conduct for which the defendant has been separately convicted or acquitted, then the defendant has already been prosecuted for a lesser included offense and prosecution of the greater offense is barred by the Double Jeopardy Clause. The decision in *Grady v. Corbin*, therefore, is simply a reaffirmation of this Court's previous decisions in *Harris v. Oklahoma* and *Illinois v. Vitale*.

In other words, when a court is confronted with an issue of double jeopardy, the court must look not only to the *statutory* elements of the two offenses to see if one is a greater or lesser included offense of the other; the court must also look to the *essential* elements of the two offenses, namely, whether conduct *which is the essence of one offense* is also a necessary ingredient in the proof of the other offense.

In *Grady v. Corbin, supra*, the defendant was involved in a fatal traffic accident in which he was ticketed for driving while intoxicated and failing to keep to the right of the median. After the defendant had been convicted of both offenses, the State of New York attempted to prosecute the defendant for involuntary manslaughter. The prosecutorial theory for the manslaughter charge was that the defendant had recklessly caused the victim's death (1) by driving while intoxicated, (2) by failing to keep to the right of the median, and (3) by driving too fast for the weather and road conditions pending at the time of the accident. In other words, one or more of the aforementioned factors was necessary to

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[5] This Court wrote in *Grady v. Corbin, supra*, at 2087: "Today we...hold that the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential *element* of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." (Emphasis added).

elevate an otherwise ordinary traffic accident into a involuntary manslaughter; proof of one or more of these acts of recklessness was, therefore, *essential* to a conviction for involuntary manslaughter. The defendant, of course, had already been prosecuted for 2 of the 3 reckless acts which were, in essence, lesser included offenses of the involuntary manslaughter, and the Court held that the manslaughter prosecution was, therefore, barred by the Double Jeopardy Clause.

This Honorable Court was careful to note that its analysis did not depend to any degree upon a "same evidence" test:

> [T]he Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. This is not an "actual evidence" or "same evidence" test. The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove the conduct.

Grady v. Corbin, supra, at 2093. Furthermore, this Court made it clear that it was not relying upon the "same transaction" test. The Court, for example, observed that the State of New York was free to prosecute the defendant for involuntary manslaughter so long as the theory of prosecution relied on some reckless act for which the defendant had not yet been prosecuted, i.e., speeding.[6] Again this Court noted

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[6] If, by the terms of its indictment or bill of particulars, the State of New York limited its prosecutorial theory in a new trial only to the single reckless act of speeding, could the prosecutor offer evidence of intoxication and weaving during the course of the trial? This question was not directly answered by this Court in *Grady v. Corbin, supra*, but it would

that if it were adopting a "same transaction" test, the prosecution would be barred from seeking a conviction for involuntary manslaughter merely from the fact that it had already convicted the defendant of another offense committed in the "same transaction." The Court unambiguously stated that it "has 'steadfastly refused to adopt the 'single transaction' view of the Double Jeopardy Clause.'" *Grady v. Corbin, supra*, at 2094 n.15.

In the instant case, "speeding" is not a lesser included offense of "driving while intoxicated" by virtue of shared elements as in *Blockburger;* neither is it a lesser included offense because it is an "essential element" of driving while intoxicated as in *Grady v. Corbin.* At the initial writ hearing, the trial prosecutor, who perhaps misunderstood the holding in *Grady v. Corbin*, told the court that the State would not offer evidence of "speeding" to prove that Respondent was "driving while intoxicated." While the honor and integrity of the State's attorney will undoubtedly bind him to this obligation, neither the Fifth Amendment nor this Court's decision in *Grady v. Corbin, supra*, required him to make such a commitment. Unlike "felony-murder" and "involuntary manslaughter," the crime of "driving while intoxicated" does not depend upon, incorporate, or rely upon the commission of any other offense before it is complete. While speeding, weaving, and failing to observe traffic signals may constitute some *evidence* of intoxication, none of

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seem that neither the holding nor the rationale expressed therein would bar such evidence. The jury would undoubtedly learn that Corbin had crossed the median; how else could the prosecutor explain the victim's death. Presumably, the jury would be instructed, however, that it could not return a guilty verdict unless the jury was convinced that Corbin's speeding was, *by itself*, a sufficiently reckless act to justify a conviction for involuntary manslaughter.

these offenses constitutes an essential *element* of "driving while intoxicated."

For example, if in *Grady v. Corbin, supra*, the trial had proceeded unabated, and the State of New York had failed in trial to show that Corbin was driving while intoxicated, that he illegally crossed the median, or that he was speeding at the time of the fatal accident, no conviction could be obtained. Likewise, if in *Harris v. Oklahoma, supra*, the State of Oklahoma had failed to show that Harris was intentionally perpetrating a robbery when the victim was killed, he could not have been convicted of felony-murder. However, if the State of Texas fails to show in this case that Respondent was "speeding," she may nevertheless be convicted of "driving while intoxicated." The fact that the prosecutor at trial could pledge to prosecute the case without offering proof of speeding unequivocally demonstrates that "speeding" and "driving while intoxicated" are not the "same offense" and are not subject to the Fifth Amendment's prohibition against double jeopardy.

For this reason, Petitioner argued on appeal that the trial court's denial of Respondent's plea in bar should be affirmed not because of the trial prosecutor's unnecessary commitment to refrain from offering proof of "speeding," but rather because neither the Fifth Amendment nor this Court's holding in *Grady v. Corbin, supra*, support Respondent's contention that "speeding" and "driving while intoxicated" are the "same offense." Unfortunately, the intermediate appellate court fell prey to Respondent's suggested misconstruction of this Court's decision in *Grady v. Corbin, supra*. The Court of Appeals for the Fourteenth District of Texas concluded that "speeding" and "driving while intoxicated" might be the same offense, but affirmed the trial court's denial of relief because the State's attorney had pledged not to offer evidence of "speeding" to establish Respondent's

guilt in her trial for "driving while intoxicated." Both sides were unhappy with the decision, and both parties sought review from the Texas Court of Criminal Appeals.

The Texas Court of Criminal Appeals, like the intermediate appellate court, erroneously concluded that if Petitioner offered any evidence that Respondent had been "speeding" just before the traffic accident, Petitioner's use of this "conduct" would violate the Double Jeopardy Clause because she had been previously prosecuted for this "same conduct" in the "speeding" case. By virtue of the Court's opinion in the case *sub judice*, the bench and bar of Texas have been instructed that where two or more offenses arise out of the same criminal transaction, the defendant cannot be prosecuted in separate trials for these various offenses unless the prosecutor first formally commits in writing that he will not offer, use, or rely on "conduct" offered at a previous trial. In other words, where a defendant, in one criminal transaction, robs ten people, then kills two of his victims, kidnaps the other eight, and then sexually assaults two members of that group, the prosecution could not, as a practical matter, separately prosecute the defendant for the various offenses committed during his crime spree. If the State limited its first prosecution solely to the robbery of one victim, could it ever prosecute the defendant for his subsequent sexual assault of another victim? The State could not, for example, show the jury that the victim was first taken against her will during a robbery without offering proof of "conduct" previously used in the robbery case. Surely, this is not what this Honorable Court intended by its decision in *Grady v. Corbin, supra*.

Moreover, the decision of the Texas Court of Criminal Appeals is in conflict with several decisions of United States Courts of Appeals. For example, in *United States v. Tormos-Vega*, 959 F.2d 1103 (1st Cir. 1992), *cert.*

denied, 113 S.Ct 191 (1992) the defendant was convicted of mail and wire fraud. During the trial, the government offered evidence showing that these offenses were committed in conjunction with an extortion offense. Thereafter, the defendant was subsequently prosecuted in a separate trial for the extortion offense where he argued that double jeopardy considerations prevented his prosecution. The United States Court of Appeals for the First Circuit held that *Grady v. Corbin, supra*, did not prevent defendant's prosecution for extortion:

> [T]he existence of the earlier transaction was not "an essential element" of the extortion offense. Instead, the purpose of the introduction of evidence of that transaction at the extortion trial was merely to provide background information. That evidence merely filled in a gap in the evidence so that the jury could understand how the $66 million transaction came to involve $66 million instead of only $47 million.... [Defendant] has pointed out only an "evidentiary overlap" which does not constitute a double jeopardy violation.

United States v. Tormos-Vega, supra, at 1119.

Likewise, in *Prince v. Lockhart*, 971 F.2d 118 (8th Cir. 1992), the United States Court of Appeals for the Eighth Circuit was confronted with a case where the defendant was prosecuted for his unlawful possession of certain pharmaceutical drugs which he had previously stolen during the burglary of a pharmacy. He was acquitted of the drug possession charge, and he was subsequently prosecuted for his burglary of the pharmacy and the theft of the pharmaceutical drugs found therein. The Court wrote:

> The district court held, and we agree, that *Grady* is inapplicable here. Prince is essentially arguing that *Grady* establishes a

> "same evidence" test. *Grady* specifically disclaimed such a test, *id.* at 521, 110 S.Ct. at 2093, and the Supreme Court has said unequivocally that no such test exists. *United States v. Felix*, —— U.S. ——, ——, 112 S.Ct. 1377, 118 L.Ed.2d 25 (1992) ("our precedents hold that a mere overlap in proof between two prosecutions does not establish a double jeopardy violation"); *cf. Dowling v. United States*, 493 U.S. 342, 110 S.Ct. 668, 107 L.Ed.2d 708 (1990). "The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove the conduct." *Grady*, 495 U.S. at 521, 110 S.Ct. at 2093. Thus, courts have interpreted *Grady* to prohibit a prosecution that seeks to establish the entirety of an element of the charged offense with proof of already-litigated conduct. *United States v. Clark*, 928 F.2d 639, 642 (4th Cir.1991); *United States v. Uselton*, 927 F.2d 905, 908-09 (6th Cir.1991). ...[T]he evidence of possession—the seized drugs—was not used to prove an entire element of either charged offense. This is a case of "mere overlap of proof." We affirm the district court's holding that there was no double jeopardy violation here.

Prince v. Lockhart, supra, at 123.[7]

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[7] *Also compare United States v. Gannon*, 967 F.2d 40 (2nd Cir. 1992) [Where defendant was acquitted of a bid-rigging conspiracy charge, but was thereafter indicted for perjury stemming from his denial of other bid-rigging allegations, government was not precluded in the perjury trial from offering evidence showing defendant's participation in the first bid-rigging conspiracy.]; *United States v. Esposito*, 912 F.2d 60 (3rd Cir.

This Court's decision in *Grady v. Corbin, supra*, is applicable only to a very few criminal offenses which *require* proof of other crimes which, by their statutory elements, are not otherwise related. The Texas Court of Criminal Appeals, however, has erroneously attempted to apply this Court's holding to all criminal offenses committed in a single criminal transaction. On the issue of double jeopardy, therefore, the jurisprudence of the entire State of Texas is on the brink of darkness and misunderstanding.[8] With Texas courts now poised to return a large number of erroneous decisions on this important federal question, Petitioner would respectfully request that this Honorable Court direct and instruct the Texas Court of Criminal Appeals that its decision in this cause misinterprets the Fifth Amendment of the United States and is in conflict with the holding of this Honorable Court in *Grady v. Corbin*.

1990), *cert. dism'd*, 111 S.Ct. 806, 112 L.Ed.2d 1032 (1991) [Where defendant was acquitted of participating in a racketeering enterprise and was subsequently prosecuted for several of the predicate offenses, namely, distribution of cocaine.]; *United States v. Smith*, 963 F.2d 892 (6th Cir. 1992) [Where defendant was prosecuted for his participation in a continuing criminal enterprise under 21 U.S.C. §848, and then subsequently prosecuted for one of the predicate offenses, namely, possession of marijuana with intent to distribute.]

[8] *See State v. Houth*, 845 S.W.2d 853 (Tex. Crim. App. 1992) [Where the Texas Court of Criminal Appeals held in a prosecution for "driving while intoxicated" that the State is barred by this Court's decision in *Grady v. Corbin, supra*, from offering evidence that the defendant was "weaving" at the time of her arrest because she had been previously convicted of "failing to drive in a single marked lane."]

CONCLUSION

For the aforesaid reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX A

Opinion
In The
Court of Criminal Appeals
Of Texas

NO. 0490-91

BRENDA FAY PARRISH, Appellant

V.

THE STATE OF TEXAS, Appellee

Opinion on Appellant's Petition for Discretionary Review from the Fourteenth Court of Appeals

---

On March 31, 1990, Appellant was involved in a traffic accident. At the scene, police cited her for failure to control speed and then arrested her for driving while intoxicated. Several months later, appellant entered a plea of nolo contendere to the former charge, was convicted and assessed a fine. Later, formally charged by complaint and information with driving while intoxicated (DWI), appellant initially filed a pretrial motion in conjunction with a writ of habeas corpus, alleging the DWI prosecution was barred because of her earlier conviction for speeding. The trial court denied relief, and the court of appeals affirmed. Parrish v. State, 807 S.W.2d 411 (Tex. App. -- Houston [14th Dist.] 1991). We granted Appellant's petition for discretionary review to consider whether the lower court

erred in holding that a successive prosecution for DWI is not jeopardy barred in this case because the State intimated prior to trial that it might not prove, as a part of its DWI prosecution, that Appellant was speeding.

In Grady v. Corbin, 495 U.S. 508, 510 (1990), the United States Supreme Court held "that the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." Whether the government "will prove" conduct is not merely a question of elemental includedness, as in Blockburger v. United States, 284 U.S. 299 (1932). We are no longer concerned only with whether the government must necessarily prove the same conduct, but also with whether it will prove such conduct in fact. Thus, it is often impossible to resolve jeopardy problems by an examination of the accusatory pleadings alone.

In Corbin, the State of New York was committed to the facts through the filing of a formal bill of particulars to prove conduct for which Corbin had already been prosecuted. But the reach of Corbin is not limited to cases in which the State's pleading actually discloses or formally requires that conduct for which the accused was earlier prosecuted will again be in issue. Rather, once the defendant has made a good-faith threshold showing that the accusatory pleading charges him with a crime for which he was formerly placed in jeopardy, it becomes the prosecution's burden to establish that the two offense are not the same in fact. 495 U.S. at 522 n.14. As we understand Corbin, the State must demonstrate, in order to meet this burden, that it will not actually prove an offense for which the accused was formerly prosecuted during the prosecution of a different statutory offense arising from the same act or transaction. See Houth v. State, No. 0788-91 (Tex.Crim.App. Nov. 25, 1992).

Clearly, in cases where the State regards evidence of conduct for which the defendant was previously prosecuted as helpful but not indispensable to its prosecution of a pending case arising from the same transaction, the existence of a jeopardy bar to the second prosecution is optional. If the State is willing to forego proof of conduct for which the defendant was earlier prosecuted, the second trial may proceed. Otherwise, it is barred.

Because the State's willingness to relinquish a part of its evidence is a mater peculiarly within the discretion and control of prosecuting authorities, it is apparent that a presumptive jeopardy bar can only be overcome if the State's legal representative in court actually makes a firm commitment not to offer at trial evidence of conduct for which the defendant has already been prosecuted. We think a firm commitment in writing is required, because the defendant is entitled to a binding decision on his jeopardy claim prior to trial. See Ex parte Robinson, 641 S.W.2d 552, 555 (Tex.Crim.App. 1984). See also Houth, No. 0788-91, Slip. Op. at 12 n.6.

In the instant cause, it is apparent from the record, and the parties evidently agree, that both criminal offenses were committed simultaneously. Thus, Appellant has made a sufficient threshold showing that her earlier prosecution for speeding arose from the same act or transaction as her pending prosecution for DWI. We think it clear under such circumstances that the State must commit itself not to prove conduct constituting the offense of speeding in its second prosecution of Appellant.

In this connection, the Court of Appeals concluded that "the State has stipulated that it will not use failure to control speed to prove the DWI." Parrish, 807 S.W.2d at 412. From our independent examination of the record, this finding of fact by the court of appeals is supported only by oral statements of an assistant district attorney, made during argument before the trial judge after an evidentiary hearing

on Appellant's motion. We think it reasonable to conclude from these statements that the assistant district attorney believed, at least for purposes of the hearing, that the State was foreclosed by Corbin from proving, in its pending DWI prosecution, conduct constituting the offense of speeding. Such a belief is implicit throughout the district attorney's argument, and is expressed more than once by remarks such as, "All Corbin says, as it applies to this case, is that we can't talk about the failure to control speed."

Nevertheless we do not believe that the remarks of the assistant district attorney can also reasonably be interpreted as a commitment by the State not to prove certain conduct at trial or even as the expression of a firm intention not to do so. A fortiori, they do not establish that the State will not again prove Appellant was speeding. Certainly, the prosecution did not concede on appeal, nor does it now concede, that any stipulation to such effect was ever made. Indeed, it is the State's position on discretionary review that Appellant may be prosecuted for DWI, without offending the Double Jeopardy Clause, whether or not evidence is offered during that prosecution to prove Appellant was also speeding at the time. Accordingly, we hold the evidence insufficient for a finding that the State will not prove Appellant's failure to control speed at her DWI trial.

The judgment of the Court of Appeals is, therefore, reversed and the cause is remanded to the trial court with instructions that the complaint and information charging Appellant with DWI in cause number 9038525 before County Criminal Court at Law No. 4 of Harris County be dismissed.

MEYERS, Judge
EN BANC
DELIVERED: February 10, 1993
PUBLISH
Overstreet, J., dissents

BRENDA FAY PARRISH, Appellant

- - -

No. 490-91, v.

THE STATE OF TEXAS, Appellee

Petition For Discretionary Review from the Fourteenth Court of Appeals

(Harris County)

DISSENTING OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

By its pleading through a specialized bill of particulars practice, the prosecution in Grady v. Corbin, 495 U.S. 508, 510 (1990), locked itself into a double jeopardy holding. Such is not the case presented here. The majority speculates as to what might happen in a trial for driving while intoxicated and, based upon their sighting of gremlins, bars the State through double jeopardy.

There cannot be double jeopardy until there has been jeopardy. The reasoning of the majority escapes me. I dissent.

McCormick, Presiding Judge

(Delivered February 10, 1993)

En Banc

Publish

White, J., joins this dissent

APPENDIX B

Opinion
In The
Court of Appeals
For The
Fourteenth District of Texas

NO. B14-90-00989-CR

BRENDA FAY PARRISH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the
County Criminal Court at Law No. 4
Harris County, Texas
Trial Court Cause No. 9038525

This is an appeal from the trial court's denial of a writ of habeas corpus. Appellant brings one point of error alleging that her prosecution for driving while intoxicated (DWI) is barred by double jeopardy under U.S. CONST. Amendments 5 and 14 and TEX. CONST., Article I, Section 14. We affirm.

On March 31, 1990, appellant was involved in an accident. As a result of the accident, appellant was charged with failure to control speed involving a collision. Appellant entered a plea of nolo contendere to the charge on August 13, 1990, and was found guilty and punished by fine. Based

on the same accident, appellant was also charged with the misdemeanor offense of driving while intoxicated. Prior to trial on the DWI charge, appellant filed an application for writ of habeas corpus and special plea in bar on the theory that the DWI prosecution was barred by double jeopardy based on the prior speeding conviction. An evidentiary hearing was held before the trial court. The trial court denied the application for writ. The trial court's denial is the basis of this appeal.

In her sole point of error appellant contends that the prosecution for DWI is barred by double jeopardy principles because of her prior conviction on the speeding offense. Appellant bases her argument on the recent Supreme Court case of *Grady v. Corbin*, ___ U.S. ___, 110 S.Ct. 2084, 47 Cr. L. Rep. 2091 (No. 89-474 opinion delivered May 29, 1990). We agree that *Corbin* controls the disposition of this case, however, it does not provide appellant with the relief she requests.

To determine whether a claim is barred by double jeopardy, the first step requires the application of the *Blockburger* test. *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932). Where the act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, i.e., whether one is a lesser included offense of the other, is whether each provision requires proof of an additional fact which the other does not. *Blockburger*, 284 U.S. at 304. Under this test, speeding and DWI do not constitute one offense because each offense requires proof which the other does not. In other words, it is possible for an individual to speed without being intoxicated, and it is possible to drive while intoxicated without speeding. Thus, the prosecution in this case survives

the initial test for double jeopardy. But, because of *Corbin*, the inquiry does not end here.

When the case at hand involves a second prosecution after a person has previously been in jeopardy, it is necessary to apply the *Corbin* rule if the second prosecution first survives the *Blockburger* test.

As the Supreme Court suggested in *Illinois v. Vitale*, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980), and held in *Corbin*, the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of any offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. *Corbin*, 110 S.Ct. at 2093. This is not an "actual evidence" or "same evidence" test. *Id.* The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct. *Id.* Thus, if the State admits it will or does prove conduct for which the defendant has already been in jeopardy, the subsequent prosecution is barred. That is not the case regarding appellant.

Here the State has stipulated that it will not use failure to control speed to prove the DWI. The Supreme Court, in *Corbin*, specifically stated that if the State could prove the second offense without reliance on the offense for which the defendant has already been in jeopardy, the prosecution would not be barred by double jeopardy principles. That exact situation presents itself here. Since the State of Texas has stated that it will not use the failure to control speed to prove DWI, the "essential element" problem of *Corbin* has been circumvented. Appellant's sole point of error is overruled.

The judgment of the trial court is affirmed.

/s/ William E. Junell
Justice

Judgment rendered and Opinion filed March 14, 1991.
Panel consists of Justices Pressler, Junell and Ellis.

Publish - TEX. R. APP. P. 90.

APPENDIX C

(SEAL) OFFICIAL NOTICE
COURT OF CRIMINAL
APPEALS

March 17, 1993

COA#: 14-90-00989-CR

RE: Case No. 0490-91
STYLE: PARRISH, BRENDA FAY

On this day the State's Motion for Rehearing was denied.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

APPENDIX D

(SEAL) OFFICIAL NOTICE
COURT OF CRIMINAL
APPEALS

March 24, 1993

COA#: 14-90-00989-CR

RE: Case No. 0490-91
STYLE: PARRISH, BRENDA FAY

On this day, the State's Motion to Stay Mandate has been granted. The mandate has been stayed until 5-17-93.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

JUL 28 1993
OFFICE OF THE CLERK

NO. 92-1826

IN THE
Supreme Court Of The United States
OCTOBER TERM, 1992

THE STATE OF TEXAS,
Petitioner,
v.
BRENDA FAY PARRISH,
Respondent.

Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW
BY PETITIONER

I.

DOES THE FIFTH AMENDMENT, AS CONSTRUED BY THE HOLDING OF THIS HONORABLE COURT IN *GRADY V. CORBIN*, BAR THE SUCCESSIVE PROSECUTION OF CRIMINAL OFFENSES WHICH SHARE SOME "OVERLAPPING" CONDUCT BY VIRTUE OF THE FACT THAT THEY WERE COMMITTED IN THE SAME CRIMINAL TRANSACTION, NAMELY, MAY A DEFENDANT BE PROSECUTED FOR "DRIVING WHILE INTOXICATED" WHEN SAID DEFENDANT HAS PREVIOUSLY BEEN CONVICTED OF "SPEEDING," A CRIME WHICH IS NOT AN ESSENTIAL ELEMENT OF "DRIVING WHILE INTOXICATED".

THE QUESTION PRESENTED BY PETITIONER IS NOT RIPE FOR REVIEW AT THIS TIME

A.) The Texas Court of Criminal Appeals has not had the opportunity to consider the effect of the overruling of *Grady v. Corbin* upon Respondent's claim, that is, that even after *United States v. Dixon*, the offense of "speeding involving a collision" for which Respondent had been tried and convicted, is a species of lesser included offense of driving while intoxicated, in the same single course of conduct, for Fifth Amendment jeopardy purposes, because of the State's announced intent to prove the speeding in the DWI trial, thus rendering the two "the same offence" and barring the DWI trial as a successive prosecution.

B.) The Texas Court of Criminal Appeals may wish to decide the question as matter of state constitutional law after the overruling of

Grady v. Corbin; the matter of state law was raised at each stage of the proceedings below, so that the final decision may well rest upon an adequate and independent state ground obviating any need for this Court's review if the case is remanded.

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No. 92-1826

IN THE
Supreme Court Of The United States
OCTOBER TERM, 1992

THE STATE OF TEXAS,
Petitioner,

v.

BRENDA FAY PARRISH,
Respondent.

Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully requests that this Honorable Court deny the petition for writ of certiorari to the Texas Court of Criminal Appeals on the grounds raised by Petitioner, the State of Texas.

Respondent respectfully requests that the Court grant the petition, instead, for the purpose of vacating the judgment below and remanding the case to the Texas Court of Criminal Appeals for further consideration in light of this Court's decision in *United States v. Dixon*, 61 U.S.L.W. 4835 (U.S. June 28, 1993).[1]

1. The State of Texas, as Petitioner, and Ms. Brenda Fay Parrish, as Respondent, are the only parties to this case.

DECISION BELOW

The Texas Court of Criminal Appeals issued its *en banc* opinion on Appellant's (Parrish's) petition for discretionary review from the decision of the Court of Appeals for the Fourteenth District of Texas. The Court of Criminal Appeals denied the State's motion for rehearing as well as the motion for rehearing filed by the State Prosecuting Attorney.

The State requested and was granted a stay of mandate pending its petition to this Honorable Court for a writ of certiorari. After that stay expired the mandate did issue, but upon the State's motion the Texas Court of Criminal Appeals has withdrawn the mandate pending this Court's decision. The following documents reflecting these matters are reproduced in appendices as follows:

Appendix A.	Opinion of Texas Court of Criminal Appeals in *Parrish v. State*, No. 0490-91, issued February 10, 1993 with Order to publish, but not yet published
Appendix B.	Order of Texas Court of Criminal Appeals denying State's motion for rehearing on March 17, 1993
Appendix C.	Order of Texas Court of Criminal Appeals denying the State Prosecuting Attorney's motion for rehearing on March 17, 1993
Appendix D.	Order of Texas Court of Criminal Appeals granting Appellant's petition for discretionary review

Appendix E.	Order of Texas Court of Criminal Appeals refusing State's petition for discretionary review
Appendix F.	Opinion of Court of Appeals for the Fourteenth District of Texas in *Parrish v. State*
Appendix G.	Excerpts from Respondent's Petition for Discretionary Review and Brief on Discretionary Review in Texas Court of Criminal Appeals, raising and arguing state constitutional issue of jeopardy

JURISDICTIONAL STATEMENT

Respondent agrees with Petitioner that under 28 U.S.C. § 1257, this Honorable Court has jurisdiction to review "final judgments or decrees rendered by the highest Court of a State in which a decision could be had...by writ of certiorari...where any title, right, privilege or immunity is specially set up or claimed under the constitution...of... the United States".

The judgment in Respondent's case is a final one because the State's motions for rehearing were denied by the Texas Court of Criminal Appeals, the highest court in Texas in which Respondent could obtain a decision. Respondent did indeed claim a right under the United States Constitution, namely the Fifth Amendment, not to be twice place in jeopardy by successive prosecutions for one offense. This Court, then, has jurisdiction to review the Texas decision construing Respondent's Fifth Amendment claim.

Respondent agrees with Petitioner that on its face the decision of the Texas Court of Criminal Appeals "rested solely upon its interpretation of the Fifth Amendment to the

United States Constitution as guided by its understanding of this Court's decision in *Grady v. Corbin*, *supra*[2], and the Court did not rely upon the statutes or constitution of the State of Texas in reaching its decision". (State's Petition for Writ of Certiorari at 3) However, although the federal question certainly confers jurisdiction, the state constitutional question was raised in the trial court, in the intermediate court of appeals, in the petition for discretionary review and in the brief on discretionary review. It is thus "in the case" to a degree that warrants this Court's remanding the matter to the state court, thereby deferring review of a question that may never return in the form of a federal question at all.

CONSTITUTIONAL PROVISION

As Petitioner correctly stated, the federal constitutional provision which was addressed in this case is part of U.S. CONST., amend. V, which provides that:

> No person....shall....be subject for the same offence to be twice put in jeopardy of life or limb....

STATEMENT OF THE CASE

Respondent was charged with the misdemeanor offense of driving while intoxicated, V.A.C.S. Art. 6701-11(b). She went to trial in the Municipal Court of Houston, Texas on a complaint sworn to on June 14, 1990, charging that on March 31, 1990 she did "then and there unlawfully drive a motor vehicle on a public street at a speed greater than was reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing, to-wit: fail to control the speed of his (sic) vehicle and did collide with a motor vehicle being driven by Robert Paul Harwood who operated his vehicle in compliance with legal requirements and with due care." Respondent entered

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2. *Grady v. Corbin*, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990).

a plea of nolo contendere to this charge on August 13, 1990 and was found guilty and punished by fine.

On April 1, 1990, Respondent was also charged by complaint and information with the misdemeanor offense of driving while intoxicated, the allegation being that on March 31, 1990 she did "then and there unlawfully while intoxicated, namely not having the normal use of his (sic) mental and physical faculties by the reason of the introduction of alcohol into his (sic) body, drive and operate a motor vehicle in a public place."

It is undisputed that the two charges arose from one incident occurring on March 31, 1990.

Respondent filed an Application for Writ of Habeas Corpus and Special Plea in Bar alleging that she had been convicted previously of the same offense. She attached to her application certified copies of the complaint, judgment, and sentence in the prior case: the conviction upon a plea of nolo contendere to the charge of failure to control speed involving a collision.

On August 14, 1990 the trial court conducted an evidentiary hearing upon the special plea of former jeopardy filed by Respondent's former counsel. Undersigned counsel attached a transcription of that hearing to the writ application and special plea filed on October 1, 1990.

The officer at the hearing conceded that his determination that Respondent had lost the normal use of her mental and physical faculties because of intoxication was based not only upon the bloodshot eyes and odor of alcohol but also upon the fact she had been speeding and had had an accident. He testified, "What I'm saying to you is this here: your client was intoxicated, which did not enable her to control the speed to operate a motor vehicle properly."

With the transcription of the hearing, Respondent's written arguments in the application and all the relevant

documents to consider, the trial court denied the application on October 1, 1990.

Respondent filed written notice of appeal, pursuant to the procedure approved in *Ex parte Robinson*, 641 S.W.2d 522 (Tex.Crim.App. 1982) in order to appeal the trial court's denial of her Application for Writ of Habeas Corpus and Special Plea in Bar.

Respondent timely filed her brief in the Fourteenth Court of Appeals, Houston, on December 19, 1990, to which the State replied with a photocopied excerpt from its brief in a different case. Both sides presented oral argument. The opinion affirming the denial of relief was delivered on March 14, 1991 and is published at 807 S.W.2d 41).

Respondent filed her petition for discretionary review in the Court of Criminal Appeals on April 13, 1991, and the Court granted review on June 19, 1991. On February 10, 1993 the Texas Court of Criminal Appeals issued its opinion reversing the lower court's decision and ordering Respondent's misdemeanor information dismissed. The court has stayed its mandate of reversal pending this Court's decision on the State's petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT, VACATING THE JUDGMENT AND REMANDING TO THE STATE COURT FOR FURTHER CONSIDERATION IN LIGHT OF *UNITED STATES v. DIXON*, 61 U.S.L.W. 4835 (U.S. June 28, 1993)

THE DECISION BELOW IS NOT RIPE FOR REVIEW AT THIS TIME

A.) THE TEXAS COURT OF CRIMINAL APPEALS HAS NOT HAD THE OPPORTUNITY TO CONSIDER THE EFFECT OF THE OVERRULING OF *GRADY V. CORBIN* UPON RESPONDENT'S CLAIM, THAT IS,

THAT EVEN AFTER *UNITED STATES V. DIXON*, THE OFFENSE OF "SPEEDING INVOLVING A COLLISION" FOR WHICH RESPONDENT HAD BEEN TRIED AND CONVICTED, IS A SPECIES OF LESSER INCLUDED OFFENSE OF DRIVING WHILE INTOXICATED, IN THE SAME SINGLE COURSE OF CONDUCT, FOR FIFTH AMENDMENT JEOPARDY PURPOSES, BECAUSE OF THE STATE'S ANNOUNCED INTENT TO PROVE THE SPEEDING IN THE DWI TRIAL, THUS RENDERING THE TWO "THE SAME OFFENCE" AND BARRING THE DWI TRIAL AS A SUCCESSIVE PROSECUTION.

B.) THE TEXAS COURT OF CRIMINAL APPEALS MAY WISH TO DECIDE THE QUESTION AS A MATTER OF STATE CONSTITUTIONAL LAW AFTER THE OVERRULING OF *GRADY V. CORBIN*; THE MATTER OF STATE LAW WAS RAISED AT EACH STAGE OF THE PROCEEDINGS BELOW, SO THAT THE FINAL DECISION MAY WELL REST UPON AN ADEQUATE AND INDEPENDENT STATE GROUND OBVIATING ANY NEED FOR THIS COURT'S REVIEW IF THE CASE IS REMANDED.

A.) It would be premature for this Court to exercise its authority now to review the state court decision and decide whether it misconstrued *Grady v. Corbin*, *supra*. When the Court overruled *Grady* only a month ago in *United States v. Dixon*, *supra*, it left as the only standard for evaluating federal jeopardy claims involving successive prosecutions the decision in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed 306 (1932). *Dixon*, *supra*,

opportunity to consider the various positions taken in *Dixon* and to decide whether Respondent's claim might still survive the fall of *Grady*.

Although the writer for this Court in *Dixon*, Justice Scalia, was joined by Justice Kennedy and then by Chief Justice Rehnquist and Justices O'Connor and Thomas in overruling *Grady*, and in holding that the *Blockburger* "same elements" test was the only federal jeopardy standard, the Chief Justice and those who joined him differed with Justices Scalia and Kennedy in how to apply the *Blockburger* test to the cases of Dixon and Foster, the two petitioners.

Justice Scalia looked at the charging instruments. For example, Dixon was found guilty of contempt of court because two elements were proven against him: his knowledge of the CPO (the order that he not commit any further offense, on pain of contempt) and his commission of the offense of possession of cocaine with intent to distribute. The government's later charge for the substantive cocaine offense contained no element not already proven against Dixon in the earlier contempt proceeding and was thus a "species of lesser included offense" under this construction of the *Blockburger* test.

Chief Justice Rehnquist's opinion, on the other hand, in which Justices O'Connor and Thomas joined, maintained that the *Blockburger* test should look only to the statutory elements of the two offenses; he would have found that because the "generic crime" of contempt comprises different elements from the crime of possession of cocaine with intent to distribute, the later prosecution for the cocaine offense should not be barred under *Blockburger*.

It may well be that even under the more expansive construction of *Blockburger* there will be no support for a federal jeopardy bar in the kinds of cases the Texas Court of Criminal Appeals has been reversing based upon *Grady*, because Texas pleading has no bill of particulars requirement and only some of the penal statutes themselves list multiple

manners and means for the commission of offenses. See, for example, the reversals in Respondent's own case and in *State v. Houth*, 845 S.W.2d 853 (Tex.Crim.App. 1992) (DWI statute contains no "element" of speeding or of failure to maintain a single lane, but by an oral "bill of particulars" at a pretrial hearing the prosecution indicated its intent to avoid proof of such conduct to establish DWI, though the conduct was probative of the intoxication element).

However, the Texas courts have shown great interest in the successive prosecution issue as a matter of federal constitutional law, and should be given the chance, Respondent submits, to consider whether any such protections survive in the context of her case. Perhaps the Court of Criminal Appeals will react by turning to Texas' own Constitution.

B.) Respondent raised the Texas constitutional jeopardy issue in her pretrial plea and continued to include that question throughout the state proceedings. While until this time, as Petitioner points out in a footnote in its petition, the Texas courts have on several occasions construed the Texas jeopardy bar in accordance with this Court's application of the Fifth Amendment (State's Petition for Writ of Certiorari at 2, n.2) those cases were decided before *United States v. Dixon*, *supra*. Now that this Court has decided that *Grady* had no constitutional roots, the Texas Court may wish to seek those roots in its home ground.

Reproduced in Appendix G are excerpts from Respondent's petition for discretionary review and brief on discretionary review in the Texas Court of Criminal Appeals, included to demonstrate that if the case is remanded the Texas Court has the means to consider the state constitutional issue immediately.

For the above reasons, this case is not one which requires or merits the exercise of this Court's extraordinary and discretionary jurisdiction at this time.

CONCLUSION

Wherefore, Premises Considered, Respondent respectfully prays that the Court grant certiorari, vacate the judgment below and remand her case to the Texas Court of Criminal Appeals for further consideration in light of this Court's decision in *United States v. Dixon*, 61 U.S.L.W. 4835 (U.S. June 28, 1993.)

Respectfully submitted,

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APPENDIX A

Opinion
In The
Court of Criminal Appeals
of Texas

NO. 0490-91

BRENDA FAY PARRISH, Appellant

V.

THE STATE OF TEXAS, Appellee

Opinion on Appellant's Petition for Discretionary Review from the Fourteenth Court of Appeals

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On March 31, 1990, Appellant was involved in a traffic accident. At the scene, police cited her for failure to control speed and then arrested her for driving while intoxicated. Several months later, appellant entered a plea of nolo contendere to the former charge, was convicted and assessed a fine. Later, formally charged by complaint and information with driving while intoxicated (DWI), appellant initially filed a pretrial motion in conjunction with a writ of habeas corpus, alleging the DWI prosecution was barred because of her earlier conviction for speeding. The trial court denied relief, and the court of appeals affirmed. *Parrish v. State*, 807 S.W.2d 411 (Tex. App. -- Houston [14th Dist.] 1991). We granted Appellant's petition for

discretionary review to consider whether the lower court erred in holding that a successive prosecution for DWI is not jeopardy barred in this case because the State intimated prior to trial that it might not prove, as a part of its DWI prosecution, that Appellant was speeding.

In *Grady v. Corbin*, 495 U.S. 508, 510 (1990), the United States Supreme Court held "that the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." Whether the government "will prove" conduct is not merely a question of elemental includedness, as in *Blockburger v. United States*, 284 U.S. 299 (1932). We are no longer concerned only with whether the government must necessarily prove the same conduct, but also with whether it will prove such conduct in fact. Thus, it is often impossible to resolve jeopardy problems by an examination of the accusatory pleadings alone.

In *Corbin*, the State of New York was committed to the facts through the filing of a formal bill of particulars to prove conduct for which Corbin had already been prosecuted. But the reach of *Corbin* is not limited to cases in which the State's pleading actually discloses or formally requires that conduct for which the accused was earlier prosecuted will again be in issue. Rather, once the defendant has made a good-faith threshold showing that the accusatory pleading charges him with a crime for which he was formerly placed in jeopardy, it becomes the prosecution's burden to establish that the two offense are not the same in fact. 495 U.S. at 522 n.14. As we understand *Corbin*, the State must demonstrate, in order to meet this burden, that it will not actually prove an offense for which the accused was formerly prosecuted during the prosecution of a different statutory offense arising from the same act or transaction. *See Houth v. State*, No. 0788-91 (Tex.Crim.App. Nov. 25, 1992).

Clearly, in cases where the State regards evidence of conduct for which the defendant was previously prosecuted as helpful but not indispensable to its prosecution of a pending case arising from the same transaction, the existence of a jeopardy bar to the second prosecution is optional. If the State is willing to forego proof of conduct for which the defendant was earlier prosecuted, the second trial may proceed. Otherwise, it is barred.

Because the State's willingness to relinquish a part of its evidence is a mater peculiarly within the discretion and control of prosecuting authorities, it is apparent that a presumptive jeopardy bar can only be overcome if the State's legal representative in court actually makes a firm commitment not to offer at trial evidence of conduct for which the defendant has already been prosecuted. We think a firm commitment in writing is required, because the defendant is entitled to a binding decision on his jeopardy claim prior to trial. *See Ex parte Robinson*, 641 S.W.2d 552, 555 (Tex.Crim.App. 1984). *See also Houth*, No. 0788-91, Slip. Op. at 12 n.6.

In the instant cause, it is apparent from the record, and the parties evidently agree, that both criminal offenses were committed simultaneously. Thus, Appellant has made a sufficient threshold showing that her earlier prosecution for speeding arose from the same act or transaction as her pending prosecution for DWI. We think it clear under such circumstances that the State must commit itself not to prove conduct constituting the offense of speeding in its second prosecution of Appellant.

In this connection, the Court of Appeals concluded that "the State has stipulated that it will not use failure to control speed to prove the DWI." *Parrish*, 807 S.W.2d at 412. From our independent examination of the record, this finding of fact by the court of appeals is supported only by oral statement of an assistant district attorney, made during argument before the trial judge after an evidentiary hearing on Appellant's motion. We think it reasonable to conclude

from these statements that the assistant district attorney believed, at least for purposes of the hearing, that the State was foreclosed by *Corbin* from proving, in its pending DWI prosecution, conduct constituting the offense of speeding. Such a belief is implicit throughout the district attorney's argument, and is expressed more than once by remarks such as "All Corbin says, as it applies to this case, is that we can't talk about the failure to control speed."

Nevertheless we do not believe that the remarks of the assistant district attorney can also reasonably be interpreted as a commitment by the State not to prove certain conduct at trial or even as the expression of a firm intention not to do so. *a fortiori*, they do not establish that the State will not again prove Appellant was speeding. Certainly, the prosecution did not concede on appeal, nor does it now concede, that any stipulation to such effect was ever made. Indeed, it is the State's position on discretionary review that Appellant may be prosecuted for DWI, without offending the Double Jeopardy Clause, whether or not evidence is offered during that prosecution to prove Appellant was also speeding at the time. Accordingly, we hold the evidence insufficient for a finding that the State will not prove Appellant's failure to control speed at her DWI trial.

The judgment of the Court of Appeals is, therefore, reversed and the cause is remanded to the trial court with instructions that the complaint and information charging Appellant with DWI in cause number 9038525 before County Criminal Court at Law No. 4 of Harris County be dismissed.

MEYERS, Judge
EN BANC
DELIVERED: February 10, 1993
PUBLISH
Overstreet, J., dissents

BRENDA FAY PARRISH, Appellant

No. 490-91, v.

THE STATE OF TEXAS, Appellee

Petition For Discretionary Review from the Fourteenth Court of Appeals

(Harris County)

DISSENTING OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

By its pleading through a specialized bill of particulars practice, the prosecution in *Grady v. Corbin*, 495 U.S. 508, 510 (1990), locked itself into a double jeopardy holding. Such is not the case presented here. The majority speculates as to what might happen in a trial for diving while intoxicated and, based upon their sighting of gremlins, bars the State through double jeopardy.

There cannot be double jeopardy until there has been jeopardy. The reasoning of the majority escapes me. I dissent.

McCormick, Presiding Judge

(Delivered February 10, 1993)

En Banc

Publish

White, J., joins this dissent

APPENDIX B

(SEAL) OFFICIAL NOTICE March 17, 1993
COURT OF CRIMINAL
APPEALS COA#: 14-90-00989-CR

RE: Case No. 0490-91
STYLE: PARRISH, BRENDA FAY

On this day the State's Motion for Rehearing was denied.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

APPENDIX C

(Seal) OFFICIAL NOTICE
COURT OF CRIMINAL
APPEALS

March 17, 1993

COA# 14-90-00989-CR

RE: Case No. 0490-91
STYLE: PARRISH, BRENDA FAY

On this day the State's Motion for Rehearing filed by the State Prosecuting Attorney was denied.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

APPENDIX D

(Seal) OFFICIAL NOTICE June 19, 1991
COURT OF CRIMINAL
APPEALS COA#: 14-90-00989-CR

RE: Case No. 0490-91
STYLE: PARRISH, BRENDA FAY

On this day, the Appellant's Petition for Discretionary Review has been GRANTED. Oral argument, if desired, must be requested ^BY LETTER WITHIN 30 DAYS.^ An original and ten copies of Appellant's brief must be filed with this Court within 30 days. The State's brief is then due 30 days after the timely filing of the Appellant's brief.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

APPENDIX E

(Seal) OFFICIAL NOTICE
COURT OF CRIMINAL
APPEALS

June 19, 1991

COA#: 14-90-00989-CR

RE: Case No. 0490-91
STYLE: PARRISH, BRENDA FAY

On this day, the State's Petition for Discretionary Review has been REFUSED.

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
P.O. BOX 12308, CAPITAL STATION
AUSTIN, TEXAS 78711

APPENDIX F

Opinion
In The
Court of Appeals
For The
Fourteenth District of Texas

NO. B14-90-00989-CR

BRENDA FAY PARRISH, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the
County Criminal Court at Law No. 4
Harris County, Texas
Trial Court Cause No. 9038525

This is an appeal from the trial court's denial of a writ of habeas corpus. Appellant brings one point of error alleging that her prosecution for driving while intoxicated (DWI) is barred by double jeopardy under U.S. CONST. Amendments 5 and 14 and TEX. CONST., Article I, Section 14. We affirm.

On March 31, 1990, appellant was involved in an accident. As a result of the accident, appellant was charged with failure to control speed involving a collision. Appellant entered a plea of nolo contendere to the charge on August 13,

1990, and was found guilty and punished by fine. Based on the same accident, appellant was also charged with the misdemeanor offense of driving while intoxicated. Prior to trial on the DWI charge, appellant filed an application for writ of habeas corpus and special plea in bar on the theory that the DWI prosecution was barred by double jeopardy based on the prior speeding conviction. An evidentiary hearing was held before the trial court. The trial court denied the application for writ. The trial court's denial is the basis of this appeal.

In her sole point of error appellant contends that the prosecution for DWI is barred by double jeopardy principles because of her prior conviction on the speeding offense. Appellant bases her argument on the recent Supreme Court case of *Grady v. Corbin*, ___U.S.___, 110 S.Ct. 2084, 47 Cr. L. Rep. 2091 (No. 89-474 opinion delivered May 29, 1990). We agree that *Corbin* controls the disposition of this case, however, it does not provide appellant with the relief she requests.

To determine whether a claim is barred by double jeopardy, the first step requires the application of the *Blockburger* test. *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932). Where the act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, i.e., whether one is a lesser included offense of the other, is whether each provision requires proof of an additional fact which the other does not. *Blockburger*, 284 U.S. at 304. Under this test, speeding and DWI do not constitute one offense because each offense requires proof which the other does not. In other words, it is possible for an individual to speed without being intoxicated, and it is possible to drive while intoxicated without speeding. Thus, the prosecution in this case survives the initial test for double jeopardy. But, because of *Corbin*, the inquiry does not end here.

When the case at hand involves a second prosecution after a person has previously been in jeopardy, it is necessary to apply the *Corbin* rule if the second prosecution first survives the *Blockburger* test.

As the Supreme Court suggested in *Illinois v. Vitale*, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980), and held in *Corbin*, the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of any offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted. *Corbin*, 110 S.Ct. at 2093. This is not an "actual evidence" or "same evidence" test. *Id.* The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct. *Id.* Thus, if the State admits it will or does prove conduct for which the defendant has already been in jeopardy, the subsequent prosecution is barred. That is not the case regarding appellant.

Here the State has stipulated that it will not use failure to control speed to prove the DWI. The Supreme Court, in *Corbin*, specifically stated that if the State could prove the second offense without reliance on the offense for which the defendant has already been in jeopardy, the prosecution would not be barred by double jeopardy principles. That exact situation presents itself here. Since the State of Texas has stated that it will not use the failure to control speed to prove DWI, the "essential element" problem of *Corbin* has been circumvented. Appellant's sole point of error is overruled.

The judgment of the trial court is affirmed.

/s/ William E. Junell
Justice

Judgment rendered and Opinion filed March 14, 1991.
Panel consists of Justices Pressler, Junell and Ellis.
Publish - TEX R. APP. P. 90.

APPENDIX G

EXCERPTS FROM RESPONDENT'S PETITION FOR DISCRETIONARY REVIEW IN STATE COURT RAISING STATE CONSTITUTIONAL QUESTION

QUESTION PRESENTED AND REASON FOR REVIEW

QUESTION PRESENTED

WHETHER THE OPINION BELOW CORRECTLY HELD THAT AS LONG AS THE STATE KEEPS ITS PROMISE NOT TO "USE" OR "RELY UPON" APPELLANT'S CONDUCT OF FAILURE TO CONTROL SPEED, INVOLVING A COLLISION, FOR WHICH SHE HAS ALREADY BEEN CONVICTED, TO PROVE THE PENDING DWI CHARGE, THERE IS NO VIOLATION OF DOUBLE JEOPARDY. U.S. CONSTITUTION AMENDMENTS 5 AND 14; TEXAS CONSTITUTION, ARTICLE I SECTION 14

INDEX OF AUTHORITIES

CASELAW PAGE

Ex parte Peterson, 738 SW2d 688 (Tex.Crim.App. 1987) 5

Ex parte Robinson, 641 SW2d 522 (Tex.Crim.App. 1982) 2

Grady v. Corbin, ___U.S.___, 110 S.Ct. 2084 (1990) 5

Illinois v. Vitale, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980) 5

CONSTITUTIONAL

UNITED STATES CONSTITUTION

Fifth Amendment 4

Fourteenth Amendment 4

TEXAS CONSTITUTION

Article I, Section 14 5

C. Review is proper to determine the scope of Article I, Section 14 of the Texas Constitution, the prohibition against double jeopardy. After the supposed demise of the Texas "carving doctrine", it is time for the Court to take note of the Supreme Court opinions cited above, as well as its own long line of decisions, and decide what, if any parts of that doctrine should be born again from the Texas Constitution. The Court may allow the "same evidence" and "same transaction" tests to remain interred, but resurrect other principles that deserve constitutional protection. Cases like Appellant's have accumulated to an extent that merits this Court's attention.

EXCERPT FROM RESPONDENT'S BRIEF ON DISCRETIONARY REVIEW FOLLOWING THE GRANTING OF HER PETITION, ADDRESSING STATE CONSTITUTIONAL QUESTION

C. Finally, review was granted upon Appellant's request that the Court determine the scope of Article I, Section 14 of the Texas Constitution, the prohibition against double jeopardy. After the supposed demise of the Texas "carving doctrine," it is time, Appellant suggests, for the Court to take note of the Supreme Court opinions cited above, as well as its long line of decisions, and decide what, if any, parts of that doctrine should be born again from the

Texas Constitution. The Court may allow the "same evidence" and "same transaction" tests to remain interred, but resurrect other principles that deserve constitutional protection.

Appellant addresses all these concerns in the following argument, and asks the Court to find that in these particular circumstances the State must assess its cases in advance and either try the accused for various offenses in one trial or accept the jeopardy bar that arises from its inattention or from an ill-considered choice.

* * * *

Additional State Constitutional Concerns

This Court in a close decision only recently retreated from its longstanding "carving doctrine" that was premised upon much the same concerns as those found in the Double Jeopardy Clauses of the Federal and State Constitutions. *Ex parte McWilliams*, 634 S.W.2d 815 (Tex.Crim.App. 1982) (opinion on rehearing) The Court decided that in the future it would rely solely upon the constitutional provisions, the Fifth Amendment Jeopardy Clause of the United States Constitution and Article I., Section 14 of the Texas Constitution, instead, to resolve questions of multiple punishments and successive prosecutions. It was suggested in a footnote only last year that the carving doctrine, in principle, is still alive in those cases holding that the State may not use facts litigated in one trial to prove guilt in a second prosecution, as a matter of double jeopardy. *Rubins v. Lynaugh*, 770 S.W.2d 802, 809 n.4 (Tex.Crim.App. 1989) (Judge Teague, dissenting and concurring) Appellant submits that the courts are responding in a logical manner to the demise of "carving" by assessing the problem of multiple punishments and successive prosecutions under traditional jeopardy principles. Some principles formerly analyzed only under the carving doctrine need to take their rightful place in Texas jeopardy law.

The majority opinion in *McWilliams* suggest that the federal and state double jeopardy provisions are substantially the same. 634 S.W.2d at 823-824, but the dissenters thought otherwise, citing, for example, the case of *Hirshfield v. State*, 11 Tex.App. 207, 214 (1881) in which the Court had stated that the carving doctrine was part of the Texas constitutional protection against double jeopardy, in addition to the doctrines of former acquittal and former conviction. *Id.* at 826 (Roberts J., dissenting)

Judge Roberts also cited the rule that the states are free to enlarge upon any constitutional minimum protection the federal courts might recognize, *Id.* citing *Cooper v. California*, 386 U.S. 58, 62, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967) and opining that *Hirshfield* and other cases held that the Texas Bill of Rights does just that.

Appellant's point of error is not multifarious in asking this Court to recognize that it has the authority of the Texas Constitution, as well as the United States Constitution to formulate a "same offense" rule along the lines Appellant suggests; she only points out that the Texas Constitution provides an independent, and potentially broader basis for double jeopardy protection.